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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KERRY CLASBY, Plaintiff and Appellant, v. JENNIFER MCCOLM et al., Defendants and Respondents.	B209008 (Los Angeles County Super. Ct. No. BC353719)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Mooney, Judge. Affirmed.

The Law Offices of Allen Hyman, Allen Hyman and Christine Coverdale for Plaintiff and Appellant.

Coleman Frost LLP, Derrick F. Coleman and Daniel L. Alexander for Defendants and Respondents Jennifer McColm and California Certified Farmers Markets, Inc.

Haight Brown & Bonesteel, Gary R. Wallace and J. Alan Warfield for Defendant and Respondent Raw Inspiration, Inc.

Plaintiff/Appellant Kerry Clasby, dba California Family Farms, filed suit against Defendants/Respondents Jennifer McColm (McColm), California Certified Farmers Markets, Inc. (CCFM), and Raw Inspiration, Inc. (Raw) (collectively Respondents) after Appellant was excluded from operating stalls at farmers' markets owned and operated by Respondents. After twice sustaining demurrers with leave to amend, the trial court sustained demurrers as to every cause of action without leave to amend, dismissed Appellant's third amended complaint with prejudice, and entered judgment in favor of Respondents. We will affirm.

BACKGROUND

I. Original and First Amended Complaints

In June 2006, Appellant filed a complaint against McColm and unknown Doe defendants, alleging breach of contract. Appellant alleged that, approximately six years prior to the date of the complaint, she and McColm "entered into an oral agreement . . . whereby McColm promised [Appellant] that [Appellant] will always have use of a stall at all of the farmers markets owned by McColm as long as she paid the weekly rent in an amount equal to ten percent (10%) of [Appellant's] gross income." Appellant further stated that six of her rent checks bounced after her employee embezzled funds from her, but that she then paid the rent in full. Appellant also alleged that, following a confrontation between an employee of McColm and an employee of Appellant's, McColm "forced [Appellant] out of her space at all of the farmers markets owned by McColm because [Appellant] refused to make cash payments for the rent due the week of June 4, 2004." Appellant alleged that she was "forced to shut down her business and ultimately to sell her house." McColm filed affirmative defenses, asserting, inter alia, that Appellant's claim was barred by the statute of limitations, and that she had failed to state a cause of action.

Appellant then filed a First Amended Complaint (FAC) against Respondents, alleging breach of oral contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, constructive fraud, and interference with prospective economic advantage. According to the FAC, McColm was the President of CCFM. The FAC further stated that Raw was the corporation that held the Farmer's Market Certificate under which McColm and CCFM operated their farmers' markets.

Appellant alleged that she and McColm entered into a joint venture, stating they "spent many long hours together discussing what would be necessary to develop the European-style farmers' markets McColm envisioned." Appellant alleged "McColm requested that [Appellant] participate in all of the markets McColm owned or managed," and that, in September 1999, they "entered into an oral agreement to work together to implement their business plan, to their mutual benefit."

Appellant further alleged she "designed and decorated her booths at the markets consistent with the 'French country' image she and McColm had agreed their markets would attempt to convey," McColm instructed other vendors to emulate Appellant's booths, and, pursuant to their "joint venture," Appellant was required to participate in all the markets "owned, operated or managed" by Respondents. Appellant also averred that she incurred numerous expenses in order to further the alleged joint venture.

Appellant reiterated her allegation that one of McColm's employees physically assaulted her employee. She further alleged Respondents "decided to squeeze [her] out of the business they had built together." Appellant alleged that, after her rent checks bounced because of her employee's embezzlement, Respondents refused to accept her check and "insisted she make cash payments," "[i]n violation of the parties' agreement and long-time practice and course of dealing." Appellant refused to pay in cash "[b]ecause doing so would violate and be inconsistent with their agreement, and because [Appellant] needed and desired to have a written record of her financial dealings with [Respondents]." Respondents then allegedly forced Appellant out of her booths "based

on the pretextual reason that [Appellant] had refused to make cash payment for the prior week's rent."

McColm and CCFM filed demurrers to the FAC. They asserted that Appellant's breach of oral contract claim and her claim for the breach of the implied covenant of good faith and fair dealing were barred by the statute of limitations. They further asserted that Appellant's claims for negligent misrepresentation and constructive fraud failed to state a cause of action and were not actionable under California law. Raw also filed demurrers, asserting that Appellant had failed to state causes of action and that her claims were "uncertain and unintelligible." Respondents also filed motions to strike portions of the FAC.

At a July 2007 hearing, the trial court sustained the demurrers filed by McColm and CCFM as to the first and second causes of action in the FAC—breach of contract and breach of the implied covenant of good faith and fair dealing—on statute of limitations grounds. The court sustained the demurrers as to the third, fourth, and fifth causes of action, but allowed Appellant leave to amend her complaint as to those three claims. The court explained that the false statement alleged in the FAC was insufficient to state a cause of action for negligent misrepresentation, and there was no constructive fraud without a false statement. The court also stated there was no independent tort alleged in the FAC as to the intentional interference cause of action. In light of its ruling on the demurrers, the court found that the motion to strike was moot. The court continued the hearing as to the demurrers filed by Raw.

II. Second Amended Complaint

Appellant filed pro se a Second Amended Complaint (SAC), alleging three causes of action against Respondents: negligent misrepresentation; constructive fraud; and interference with prospective economic advantage. Appellant alleged that she "entered into a venture" with all three Respondents and incurred substantial expense in operating booths at Respondents' markets that were consistent with the agreed upon style. She averred that Respondents "specifically stated to [Appellant] that their fortunes were tied

together, and that [Appellant] should expect that their professional relationship would continue as long as [Respondents] continued to operate the Farmers' Markets."

Appellant alleged, not only that McColm intended to have Appellant establish the business for McColm and then exclude Appellant from the farmers' markets operated by Respondents and take over Appellant's business, but that Respondents entered into agreements with Appellant's employee to exclude Appellant from her own stalls at the markets. Appellant did not reiterate the allegations regarding the alleged assault by McColm's employee on Appellant's employee and the demand for payment of the rent in cash after Appellant's rent checks bounced.

Respondents filed demurrers to the SAC and motions to strike portions of the SAC. Appellant filed an opposition to the demurrers and the motions to strike.

At an October 2007 hearing, the court again sustained the demurrers with leave to amend and found that the motions to strike were moot. The court explained that the main problem with the SAC was that the original complaint and the FAC actually "spell[ed] out what was going on here." The court reasoned that Appellant had conceded in her prior pleadings that she was evicted after her rent checks bounced and that there were no allegations in any of the pleadings to indicate the existence of a joint venture. The court concluded by stating that the alleged promises made by Respondents to Appellant were "all premised on [Appellant] continuing to pay rent which she admits she didn't do." Nonetheless, the court agreed to give Appellant "a chance to explain to me why there is a joint venture here and why this case should proceed." The court accordingly sustained the demurrers with leave to amend.

III. Third Amended Complaint

Through counsel, Appellant filed a Third Amended Complaint (TAC), alleging breach of fiduciary duty, constructive fraud, and interference with prospective economic advantage. The TAC alleged that Appellant's employee, Dick Hermann, got to know Appellant's business and her business contacts and then "entered into a civil conspiracy" with McColm "to commit fraud, which purpose was to exclude [Appellant] from the joint

venture and misappropriate [Appellant's] interest." Appellant alleged that Hermann, as her agent, owed her a fiduciary duty. She also alleged that she and McColm "entered into a relationship of a fiduciary, each to the other," based on their agreement "to share joint efforts in the creation and promotion of [farmers' markets], to share information and jointly decide what markets to open," and based on their reliance "on the trust of the other in investing in the venture."

As evidence of the alleged joint venture between Appellant and McColm, Appellant stated that she contacted the Westlake Village City Council members "on behalf of MCCOLM and CLASBY, informing them that CLASBY and MCCOLM would be modifying the Westlake Village [farmers' market] to provide high-quality produce." She also cited many of the steps she took to provide booths and products for farmers' markets, as well as a Malibu City Council meeting at which she appeared with McColm.[1] Appellant alleged that, from March 2001 to April 2004, she and McColm "on a continuous basis discussed and jointly decided which produce providers to attempt to attract to the [farmers' markets]," and that they shared "information as to the design and types of stalls that would be provided in each [farmers' market] and . . . as to which produce suppliers could be attracted to participate in the MCCOLM/CLASBY markets." Appellant further alleged that she and McColm traveled together and distributed flyers for the farmers' markets throughout Los Angeles, and that they decided "which vendors would participate at the [farmers' markets] and which would not."

Respondents again filed demurrers and motions to strike. Their filings relied largely on the fact that Appellant was raising new allegations and facts, in essence changing her version of the events that precipitated her exclusion from Respondents' markets. That is, Appellant no longer recited the facts regarding the alleged embezzlement by her employee, her bounced rent checks, and her refusal to pay her rent in cash.

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[1] The minutes of the Malibu City Council meeting indicate that, in addition to Appellant, six other people appeared at the same meeting and spoke on behalf of the farmers' market, with two of them specifically speaking on McColm's behalf.

Following a May 2008 hearing, the court sustained the demurrers "in their entirety as to each and every cause of action contained in plaintiff Clasby's third amended complaint without leave to amend." The court reasoned that the TAC contained no allegations needed to state a cause of action as to a joint venture, pointing out, for example, that there was no agreement to share profits and losses. The court repeated its belief that the allegations in the FAC revealed "what's going on here." In particular, the court cited paragraphs 32 and 33 of the FAC, which alleged that Appellant discovered the embezzlement by her employee when six rent checks bounced, that McColm and CCFM then required her to make cash payments, and that she refused to pay in cash. Reasoning that the earlier complaints indicated that Appellant was excluded from the markets because of her refusal to pay her rent in cash, and that the TAC failed to allege a joint venture, the court sustained the demurrers to the first cause of action, breach of fiduciary duty, and the second cause of action, constructive fraud. The court also sustained the demurrers as to the third cause of action, intentional interference with economic relationships, again on the basis that Appellant would not have been excluded from the market if she had paid her rent in cash. The court therefore sustained the demurrers without leave to amend, dismissed the TAC with prejudice, and entered judgment in favor of Respondents. Appellant filed a notice of appeal.

DISCUSSION

Appellant challenges the trial court's sustaining of the demurrers, contending not only that the TAC adequately pleaded a joint venture, but that the allegations of the TAC are not inconsistent with the original complaint or the FAC. Appellant also contends that the trial court erred in sustaining the demurrers against her contract claims in the FAC on limitations grounds.

"On appeal from an order dismissing a complaint after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged

state a cause of action under any possible legal theory. [Citations.] We give the complaint a reasonable interpretation, 'treat[ing] the demurrer as admitting all material facts properly pleaded,' but do not 'assume the truth of contentions, deductions or conclusions of law.'" (*Long v. Century Indem. Co.* (2008) 163 Cal.App.4th 1460, 1467.) When a demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

I. Joint Venture

The trial court's ruling was based largely on the fact that Appellant's prior complaints contained allegations that Appellant agreed to pay rent to McColm, her rent checks bounced, and she refused thereafter to pay her rent in cash. The court reasoned that these allegations precluded a finding that there was any joint venture between Appellant and Respondents.

The allegations that Appellant's rent checks bounced and that she then refused to pay her rent in cash are inconsistent with a finding that Appellant's participation in the farmers' markets was part of a joint venture with Respondents. These allegations indicate that Appellant's participation in the farmers' markets was pursuant to a conventional agreement that she pay rent, rather than pursuant to a joint venture with Respondents.

Although the TAC omitted the allegations regarding Appellant's refusal to pay her rent in cash, "when a complaint contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier. [Citations.]" (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044; see also *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109 ["'A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.' [Citation.]"].) "Absent an explanation for the inconsistency, a

court will read the original defect into the amended complaint, rendering it vulnerable to demurrer again. [Citations.]" (*Banis Restaurant Design, Inc. v. Serrano*, *supra*, 134 Cal.App.4th at p. 1044.) Thus, the trial court properly relied on the allegations in Appellant's prior pleadings in sustaining the demurrers.

Appellant contends, however, that the allegations of a joint venture in her TAC are not inconsistent with the allegations in the earlier complaints regarding her payment of rent to McColm. She argues that her rental payment was part of the joint venture agreement, and that the court's finding that the allegations are inconsistent required the court to draw inferences improperly from her rental payment.

It might be possible to construe the allegation that Appellant was required to pay rent as consistent with the concept of a joint venture – under such a construction, her obligation to pay rent would have been part of their joint venture agreement. This, however, assumes that the TAC contains allegations sufficient to state a cause of action related to a joint venture.

A joint venture "requires an agreement under which the parties have (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control. [Citations.]" (*Ramirez v. Long Beach Unified School District* (2002) 105 Cal.App.4th 182, 193.) The allegations in the TAC are not sufficient to state a cause of action as to a joint venture.

The TAC alleged that Appellant promised to provide the primary produce stalls to Respondents' farmers' markets; that McColm would manage and own the markets; that Appellant and McColm jointly would determine which produce providers would attend each market; and that McColm promised that Appellant would have the principal stalls at the markets. The TAC did allege that "it was anticipated that [Appellant] would lose money during the early stages of the creation of each [market]," but there is no allegation that McColm would share in any of those losses. In fact, the TAC alleged that "CLASBY agreed to accept the losses CLASBY would incur during start up time periods, separately from MCCOLM, and MCCOLM agreed that MCCOLM would incur

any losses that MCCOLM might incur during the start up periods." The only allegation that addresses the issue is paragraph 66, which states: "MCCOLM would provide MCCOLM's capital and management, and CLASBY would provide CLASBY's capital and management to guarantee the provision of produce. As to sharing of profits and losses, it was anticipated that there would be losses by both CLASBY and MCCOLM during the startup periods."

Other allegations in the TAC indicate that Appellant was merely a vendor at Respondents' markets, or, at most, an assistant manager as to produce vendors. For example, Appellant alleged that she "agreed to pay MCCOLM 10% of [her] gross sales," and that McColm would manage and own the markets, but Appellant would "assist in management with regard to all vendors providing produce."

On the whole, even when construed in Appellant's favor, the TAC does not allege that Appellant and McColm agreed to share profits and losses or they agreed to share an ownership interest in the farmers' markets. Rather, the allegations indicate McColm retained sole ownership of the markets and each party was responsible for her own profits and losses. There is no allegation as to an agreement to own the markets together and to share profits and losses, other than a general allegation that "defendants specifically stated to CLASBY that 'their fortunes were tied together . . . .'" Thus, even though we "'treat[] the demurrer as admitting all material facts properly pleaded,'" the facts alleged in the TAC fail to support a finding that there was a joint venture between the parties. (*Long v. Century Indem. Co.*, *supra*, 163 Cal.App.4th at p. 1467.)

II. Causes of Action Alleged in TAC

A. Breach of Fiduciary Duty

Turning to the causes of action alleged in the TAC, the first cause of action alleged breach of fiduciary duty. A fiduciary relationship is a relationship "existing between parties to a transaction wherein one party is duty bound to act with the utmost good faith for the benefit of the other." (*Brown v. Wells Fargo Bank, NA* (2008) 168 Cal.App.4th 938, 960.) "'[B]efore a person can be charged with a fiduciary obligation, he must either

knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.' [Citation.]" (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386.) Significantly, "'"[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party."' [Citation.]" (*Brown v. Wells Fargo Bank, NA, supra*, 168 Cal.App.4th at p. 960.)

The TAC does not contain any allegations sufficient to state a cause of action for breach of fiduciary duty. There are no allegations that would support a finding that either Hermann or McColm had a fiduciary duty toward Appellant. There are no allegations regarding any disparity of bargaining power or any inequalities in the relationship between Appellant and Hermann or between Appellant and McColm. Nor does the TAC allege that Appellant was vulnerable or that she needed to place her trust and confidence in Hermann or McColm because of their superior positions to her. None of Appellant's allegations support a finding that Appellant's relationships with Hermann and McColm imposed "fiduciary obligations far more stringent than those required of ordinary contractors." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30.)

B. Constructive Fraud

The second cause of action in the TAC is for constructive fraud. "Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him . . . ." (Civ. Code, § 1573). "'"Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship."'" (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415.) The facts alleged in the TAC, even if liberally construed, are not sufficient to state a cause of action for constructive fraud because "only a fiduciary can be liable for constructive fraud," and there are no allegations to support a finding that

Hermann or McColm owed a fiduciary duty toward Appellant. (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1108.)

C. Intentional Interference with Economic Relationships

The third cause of action in the TAC is for intentional interference with economic relationships. "The tort of intentional interference with contractual relations requires: '"(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." [Citation.].' [Citations.]" (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 10.)

The TAC alleges that Respondents interfered with Appellant's economic relationship with Hermann, and that they wrongfully misappropriated her entire business by interfering with her relationship with Hermann. The TAC does not, however, contain allegations of facts that would support Appellant's allegation that Respondents interfered with her economic relationship with Hermann. Instead, the TAC contains only the conclusory contention that Respondents somehow interfered with Appellant's relationship with Hermann, with no factual allegations as to how they did so.

The TAC alleges that Appellant hired Hermann to help her "in support of the joint venture" and that Hermann "came to know all of CLASBY's business contacts, source of produce contacts and the operation of CLASBY's business, had custody of CLASBY's property, CLASBY's 30 tents, tables, decorations, with regard to the joint venture." The next allegation referring to Hermann is that McColm contacted Hermann "and entered into an agreement with HERMANN to misappropriate CLASBY's business, and interest in the joint venture and to exclude CLASBY from the joint venture." McColm allegedly "entered into an agreement with CLASBY's assistant, HERMANN, to provide the produce that CLASBY was providing at the nine [farmers' markets,]" and "MCCOLM with the assistance of HERMANN excluded CLASBY from the joint venture." The TAC also alleges that Respondents "entered into agreements with HERMANN, excluded

CLASBY from her own stalls other than the flower stall, and in conjunction with CLASBY's employee, converted CLASBY's personal property, and in June, 2004, excluded CLASBY from all of" Respondents' markets.

Although the TAC alleges that McColm and Hermann agreed to misappropriate Clasby's business, this allegation is a contention or conclusion of law, and, in reviewing a complaint, we do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 967.) The TAC does not contain material facts alleging that Respondents engaged in "'intentional acts designed to induce a breach or disruption of the contractual relationship'" between Appellant and Hermann. (*Davis v. Nadrich*, *supra*, 174 Cal.App.4th at p. 10.) The TAC therefore does not contain allegations sufficient to state a cause of action as to intentional interference with economic relationships.

III. Breach of Contract Claim in First Amended Complaint

Appellant contends that the trial court erred in dismissing her breach of oral contract claims on limitations grounds. The statute of limitations for a breach of oral contract claim is two years. (Code Civ. Proc., § 339.) "Code of Civil Procedure section 474 permits a plaintiff to amend complaints by adding parties as Doe defendants '[w]hen the plaintiff is ignorant of the name of a defendant' at the time the complaint is filed. [Fn. omitted.] 'The purpose of section 474 is to enable a plaintiff to avoid the bar of the statute of limitations when he [or she] is ignorant of the identity of the defendant.' [Citation.]" (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 386.)

Appellant filed her original complaint against McColm and Does 1 through 50 on June 9, 2006, alleging that McColm breached an oral agreement to allow Appellant a stall at McColm's farmers' markets. The complaint alleged that McColm breached the oral contract on June 10, 2004, when she "forced" Appellant out of her space for failure to pay the rent in cash. There is no question that the original breach of oral contract claim against McColm and the Doe defendants was filed within the two-year limitations period.

Appellant's FAC was filed on March 22, 2007, this time adding CCFM and Raw as defendants. The FAC alleged breach of oral contract and breach of the implied covenant of good faith and fair dealing (hereinafter referred to collectively as the "breach of contract claims") against all the defendants, stating that "Defendants, acting through their agent, McColm," breached the contract by excluding Appellant from the farmers' markets.

CCFM and Raw demurred to the breach of contract claims on statute of limitations grounds. McColm and CCFM argue that Appellant abandoned her breach of contract claims against McColm because the trial court did not rule on any demurrers as to those causes of action on McColm's behalf. We agree.

McColm and CCFM jointly filed demurrers to the FAC. However, the notice of demurrers clearly stated that CCFM alone demurred to the breach of contract claims, and that both McColm and CCFM demurred to the remaining two causes of action. In addition, the argument contained in the memorandum in support of the demurrers indicates that only CCFM demurred to the breach of contract claims because it was based on a relation back argument, which applied only to CCFM. Thus, McColm clearly did not demur as to the breach of contract claims.

When Appellant filed her SAC and TAC, she omitted the breach of contract claims in their entirety. However, she should have included the breach of contract claims against McColm because there was no limitations argument made by McColm; nor could there have been because the breach of contract claims were timely as to McColm. Appellant accordingly abandoned her breach of contract claims against McColm.

As for the breach of contract claims against CCFM and Raw, the question is whether Appellant "was truly ignorant of the identity of the person brought into the case as a Doe defendant because if that requirement is met, the amendment to the complaint relates back to the date the complaint was filed and the statute of limitations is preserved." (*Davis v. Marin*, *supra*, 80 Cal.App.4th at pp. 386-387.) The allegations of

the FAC indicate that Appellant was aware of the identity of CCFM and Raw when she filed her original complaint.

CCFM, the new business developed by McColm, was the very basis for the alleged joint venture in which Appellant and McColm were participating. At the time Appellant filed her original complaint, all of the events regarding Appellant's and McColm's discussions and efforts regarding how to make CCFM successful already had occurred, and Appellant, in fact, alleged in the FAC that her rent payments had been made to McColm and CCFM for six years.

Appellant's allegations regarding her numerous discussions with Clasby indicate that Appellant was not "truly ignorant" of Raw's identity. (*Davis v. Marin*, *supra*, 80 Cal.App.4th at p. 386.) For example, Appellant alleged that Clasby held the farmers' market certificates in Raw's name. As the operator of farmers' markets, Clasby was required to keep the certificates at the markets during their operation. (Cal. Code Regs., tit. 3, § 1392.9.) In addition, the lengthy discussions Appellant and Clasby allegedly held indicate that Appellant was aware of Raw's identity. The FAC accordingly does not relate back to the date the original complaint was filed. The trial court therefore did not err in dismissing Appellant's breach of oral contract claims.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.